No. 09-879

In The
Supreme Court of the United States

KAREN WAESCHLE, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioner,

v.

LJUBISA J. DRAGOVIC, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MEDICAL EXAMINER OF OAKLAND COUNTY, MICHIGAN, AND OAKLAND COUNTY, MICHIGAN, A MUNICIPAL CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

PATRICK J. PEROTTI, ESQ.
DWORKEN & BERNSTEIN CO., L.P.A.
60 SOUTH PARK PLACE
PAINESVILLE, OHIO 44077
(440) 352-3391
(440) 352-3469 FAX
pperotti@dworkenlaw.com

JOHN H. METZ, ESQ.
Counsel of Record
1117 EDWARDS ROAD
CINCINNATI, OHIO 45208
(513) 241-8844
(513) 321-6389 FAX
metzlegal@aol.com

Attorneys for Petitioner

March 5, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY 1

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Albrecht v. Treon,
118 Ohio St.3d 348, 2008-Ohio-2617 (2008) . . 8

Arizonans for Official English v. Ariz.,
520 U.S. 43 (1997) 1

Austin v. New Hampshire,
420 U.S. 656 (1975) 10

Bouie v. Columbia,
378 U.S. 347 (1964) 5

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263 (1993) 10

Brotherton v. Cleveland,
923 F.2d 477 (6th Cir. 1991) 1, 2, 3, 4, 8

Cohens v. Virginia,
19 U.S. 264 (1821) 8

Lehman Bros. v. Schein,
416 U.S. 386 (1974) 10

Meredith v. Winter Haven,
320 U.S. 228 (1943) 11

Parsons Steel, Inc. v. First Alabama Bank,
474 U.S. 518 (1986) 10

United States Term Limits v. Thornton,
514 U.S. 779 (1995) 10

Waeschle v. Dragovic,
576 F.3d 539 (6th Cir. 2009) 6

Whaley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs,
58 F.3d 1111 (6th Cir. 1995) ..... *passim*

Wyoming v. Oklahoma,
502 U.S. 437 (1992) 10

REPLY

Respondents argue that the Sixth Circuit acted properly in certifying this case to the Michigan Supreme Court. As support, respondents rely on this Court's observation in *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 77 (1997) that "[t]hrough certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and help build a cooperative judicial federalism.'"

That doctrine is not applicable however where the law is neither novel nor unsettled. When the law is settled on a federal issue by published, circuit decision, it violates federalism in the most fundamental way to punt something governed by that law to a state court for a second opinion. That is the issue for certification here.

The law on this issue in the Sixth Circuit was clearly established in *Whaley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs,* 58 F.3d 1111 (6th Cir. 1995) *and Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).

The Sixth Circuit in *Brotherton* clearly and unambiguously stated:

> "OHIO REV.CODE Sec. 2108.02(B), as part of the Uniform Anatomical Gift Act governing gifts of organs and tissues for research or transplants, expressly grants a right to Deborah Brotherton to control the disposal of Steven Brotherton's body. *Everman* expresses the

recognition that Deborah Brotherton has a possessory right to his body. 54 Ohio App.3d at 121, 561 N.E.2d 547. *Carney* allows a claim for disturbance of his body. 33 Ohio App.3d at 37, 514 N.E.2d 430. Although extremely regulated, in sum, these rights form a substantial interest in the dead body, regardless of Ohio's classification of that interest. **We hold the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a "legitimate claim of entitlement" in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment.** (Emphasis added.)

We also hold the removal of Steven Brotherton's corneas were caused by established state procedures and that Ohio failed to provide the necessary predeprivation process."

The Sixth Circuit re-pronounced in even more certain terms in dealing with Michigan law in *Whaley*:

"All parties agree that the existence under Michigan law of a constitutionally protected property interest in a dead relative's body turns on our opinion in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir.1991), where we found that such a property interest exists under Ohio law. .....We reversed, holding that Ohio law created a "legitimate claim of entitlement" and thus a property interest in a dead relative's body. Id. at 482..... **Because *Brotherton* is the law of this Circuit**, our decision in the present case turns on a comparison of Ohio and Michigan

law. If Michigan recognizes the same basic rights in a deceased person's body as Ohio, **then *Brotherton* controls and we must reverse** the district court. After reviewing Ohio and Michigan law, we conclude that they are in substance the same regarding the next of kin's rights in a deceased relative's body. **If anything, Michigan is even more explicit than Ohio in its acknowledgment of these rights.** (Emphasis added.)

"...MICH.STAT.ANN. Sec. 5.953(5) states that "[t]he county medical examiner shall, after any required examination or autopsy, promptly deliver or return the body to relatives or representatives of the deceased;" and MICH.STAT.ANN. Sec. 5.953(8) requires the state to return the body "to the person entitled to the custody or possession of [it]." Both of these statutes imply that the next of kin do indeed have a "right" to the deceased relative's body. ,,,, **we conclude that Michigan, like Ohio, provides the next of kin with a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes. Accordingly, the next of kin may bring a constitutional claim under the Due Process Clause.** (Emphasis added.)

This current Sixth Circuit panel has engrafted onto the Circuit precedents imaginary additional limiting language in an attempt to create a difference where one does not exist. This panel claims the distinction being one involving "a lawful autopsy." However, this panel overlooks or ignores that both *Brotherton* and

Whaley's "takings" were in fact done pursuant to a coroner's "lawful autopsy." All of these coroners get access to the bodies via performing a "lawful autopsy," that is not a distinguishing situation rather it is a common circumstance in every case. Such is nothing that sets it apart factually from binding precedent whatsoever.

This panel also attempts to use a "retrospective" analysis to determine Constitutional rights. This dangerous pseudo-intellectual approach is unworkable in the real world. Citizens must know what the law is and what the limitations are on their conduct presently, not wait for a future "retrospecto-scope" analysis. This is precisely the importance of *stare decisis*, particularly as to Constitutional rights. When a body part is taken and not returned to the family it is of no matter what "use" the body part is put to later. The subsequent use cannot retroactively turn an illegal act into a permissible one.

Neither *Brotherton* nor *Whaley* made any distinction that the Federal Constitutional right they announced only applied in cases where one "steals a body part for private gain" (as alleged by Respondents). In both cases it was the State actor (i.e. the coroner) and government, who were held liable constitutionally. Both precedents did not absolve the governmental State Actors. Whether eye banks or other third-parties did or did not make any profit was not part of the Constitutional analysis for purposes of finding liability for the "taking" by the governmental defendants.

The *federal* law as announced in those cases gave petitioner a protectable interest in her mother's

remains at the time of the conduct complained of in petitioner's complaint. Petitioner's cause of action accrued, and her rights vested, when that interest was violated by the defendants. Petitioner has the right to have her claims judged by that federal law which was in effect at the time of the conduct at issue as that law was established by the Sixth Circuit. As this Court observed in *Bouie v. Columbia*, 378 U.S. 347, 354 (1964), "a federal right turns upon the status of state law as of a given moment in the past -- or, more exactly, the appearance to the individual of the status of state law as of that moment."

The Sixth Circuit was fully capable of making the determination of state law as of that moment in the past, and it did so in *Whaley*. In fact, as petitioner has already explained in her Petition, given the fact that the analysis of the property interest at issue here involved the analysis of the *bundle* of rights and interests involved, rather than the interpretation of a *particular* statute or constitutional provision, the federal court was charged with rendering its binding ruling whether the range of interests recognized in Michigan, the sticks in the bundle, gave rise to a federally protected interest. And the Sixth Circuit in *Whaley* concluded that they did.

In *Whaley* the Sixth Circuit examined Michigan law and determined that the next of kin had in interest in the remains of their deceased loved ones that was protected by the Fourteenth Amendment. In reaching that conclusion the Sixth Circuit specifically held that "Michigan provides the next of kin with a constitutionally protected property interest in the dead

body of a relative."[1] The court in *Whaley* did not condition its holding on the fact an autopsy was performed, though one was, or on the fact that the eyes were removed outside the scope of the autopsy, just as the brain issue here was destroyed outside the scope of the autopsy. The court in *Whaley* determined as a fundamental principle, the fundamental principle which underlies petitioner's action, that "Michigan provides the next of kin with a constitutionally protected property interest in the dead body of a relative." This constitutionally protected property interest applied to the body and all its parts, including the eyes and the brain. This constitutionally protected property interest applies regardless of whether an autopsy is performed.

Attempt to set aside the precedent of *Whaley* and ship it to the state Supreme Court to overrule, as it sees fit, is not allowed. That tactic can not be permitted under a system with federal supremacy, regardless what label is used to accomplish it. Here, the argument that "Michigan law is at best equivocal"[2] falls flat in the face of *Whaley* which stated the opposite, and announced itself as the binding federal law of the Circuit.

Katherine Weins's brain was not retained as evidence, as petitioner concedes would have been permissible if a criminal prosecution is contemplated. It was only retained for examination. Once its examination was completed it was not returned to her

---

[1] *Whaley*, 58 F.3d at 1116.

[2] *Waeschle v. Dragovic*, 576 F.3d 539, 550 (6th Cir. 2009).

next of kin, as it might easily have been, it was instead destroyed. Petitioner has never questioned the "police power" of the State to perform the autopsy; however, the Michigan autopsy statutes do not empower the Medical Examiner to destroy federally protected property rights. While the State may take temporary custody of property, it may not, without notice and due process, destroy it.

Simply put, the fact that an autopsy was performed, or that the autopsy was performed in connection with a potential criminal investigation, has absolutely no impact on petitioner's constitutionally protected right as recognized by the Sixth Circuit in *Whaley*. It simply cannot be argued that the state had any further need for Katherine Weins's brain at the time of its destruction since the destruction of her brain effectively prevented any further use of the brain for examination or as evidence. The destruction of Katherine Weins's brain thus could not have served any forensic purpose whatsoever. And no forensic purpose would have been thwarted by returning the brain to her next of kin for disposition as opposed to destroying it.

Under the law of the Sixth Circuit at the time at issue petitioner had a clearly established right to direct the disposition of Katherine Weins's brain after it was no longer needed for examination. Unless a state court has the right to overrule a federal decision, Petitioner has the right to have her case judged on its merits under the law that was in effect at the time the conduct at issue occurred.

Because that law was announced by a federal court in *Whaley* it was contrary to the fundamental

principles of federalism for the panel below to now direct the district court to certify its question to the Michigan Supreme Court. It was wrong for the panel that decided this case below to direct the district court to certify its question to the Michigan Supreme Court when the question had already been decided in *Whaley*. Instead, the panel should have decided the appeal based on the binding precedent of the Sixth Circuit. As this court noted in *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) "[i]t is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should."

Respondents argue that petitioner has suffered no "harm" from the panel's directive to certify its question because the Michigan Supreme Court has not yet ruled, and may rule in petitioner's favor. Respondents miss the point entirely. It was the certification which was the harm. It was the certification which impermissibly granted the Michigan Supreme Court the right to review a published decision of the Sixth Circuit. It was the certification which impermissibly affords the Michigan Supreme Court the opportunity to be the final arbiters of Michigan's compliance with federal law. It was the certification which offends the fundamental principles federalism. And it is the violence done to these fundamental principles of federalism which is the compelling reason for this Court to grant petitioner's petition.

As respondents point out, the parallel case of *Albrecht v. Treon*, 118 Ohio St.3d 348, 2008-Ohio-2617 (2008), suffered a similar fate when an Ohio District Court ignored *Brotherton* and certified the case to the Ohio Supreme Court which completely overruled *Brotherton*.

The certification-punt herein does, in itself, deny Petitioner's rights. For one need not be a soothsayer to see that even if the Michigan Supreme Court agrees with the prior Sixth Circuit's ruling in *Whaley*, the federal courts will then hold that the law was "not clearly established" since their very certification proves that. So if this Court does not protect Federal jurisdiction and foreclose the Michigan Supreme Court from determining Federal law, Petitioner and the Federal system are already harmed.

This certification itself also does harm to Federalism (as well as Petitioners) by inviting a State court to retroactively overrule Federal precedent. Since petitioners have a right to their claims as recognized by the law that was in existence at the time, this maneuver empowers a State court to retroactively extinguish federally recognized Constitutional rights. This would allow State courts to immunize themselves from federal liability in violating federal civil rights – an intolerable, incongruent result.

The Federal Judiciary is the ultimate protectors of Federal rights. Such a sacred duty should not be relinquished for the mere convenience of respondents not wishing to take the time to notify next of kin of their "takings." This case presents significant abandonment of the efficacy of federal judicial precedent and federal court powers. Such an important transfer of power should invoke this Court attention to safeguard the Supreme Law of the land and to grant the within Writ. This Writ does present this court with an extraordinary situation which needs to be safeguarded by this Court's powers.

As Justice Kennedy explained in his concurring opinion in *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) "[f]ederalism was our Nation's own discovery." Concurring again in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287 (1993), Justice Kennedy, observed that "federal balance is a fragile one" and noted that "essential considerations of federalism are at stake here."

In *Wyoming v. Oklahoma*, 502 U.S. 437, 450-451 (1992), this court noted that the "serious and important concerns of federalism" found in that case were "fully in accord with the purposes and reach of our original jurisdiction." And after noting in *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) that "[w]hen a tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion" this Court observed that "[t]his consideration applies equally to * * * the maintenance of our constitutional federalism." In his concurring opinion in *Lehman Bros. v. Schein*, 416 U.S. 386, 393-394 (1974) Justice Rehnquist discussed this Court's decisions which "have dealt with the issue of how to reconcile the exercise of the jurisdiction which Congress has conferred upon the federal courts with the important considerations of comity and cooperative federalism which are inherent in a federal system, both of which must be subject to a single national policy within the federal judiciary." And in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986) this Court criticized the appellate court for giving "unwarrantedly short shrift to the important values of federalism and comity embodied in the Full Faith and Credit Act." These cases, along with

countless others, demonstrate that the preservation of the fundamental principles of federalism is a compelling reason for this Court to grant petitioner's petition.

In *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943) this court observed that

> diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.

That is what the Sixth Circuit did in *Whaley,* it decided questions of state law necessary to the rendition of its judgment, and its judgment was that under Michigan law the next of kin had in interest in the remains of their deceased loved ones that was protected by the Fourteenth Amendment. That was the law of the Sixth Circuit at the time the conduct here complained of took place. For the panel which rendered the decision below to direct the district court to certify a question on that same issue to the Michigan Supreme court when the issue had been decided as the law of the circuit is contrary to the fundamental principles of federalism. That is the

"harm;" that is the compelling reason for this Court to grant this petition; and that is the basis upon which the decision below must be reversed.

CONCLUSION

For the reasons set forth in Petitioner's Petition for a Writ of Certiorari, and as further set forth herein, petitioner respectfully requests that this Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

John H. Metz, Esq.
Counsel of Record
1117 Edwards Road
Cincinnati, Ohio 45208
(513) 241-8844
(513) 321-6389 Fax
metzlegal@aol.com

Patrick J. Perotti, Esq.
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391
(440) 352-3469 Fax
pperotti@dworkenlaw.com

Attorneys for Petitioner